

*Editorial*

**Information and Guidance on the Protected Disclosures Act**

Since the Protected Disclosures Act (the so-called “*whistleblower legislation*”) came into force on January 1, 2001, we have found that much more of our time and energy has been devoted to the “*information and guidance*” aspects of the Act than to being an “*appropriate authority*” to whom a protected disclosure may be made.

The Ombudsmen may act as an “*appropriate authority*” only to public sector “*whistleblowers*” but the facility for “*information and guidance*” is available to those in the private sector as well.

Section 15 of the Act sets out the requirements for providing information and guidance:-

*"Where an employee notifies the Office of the Ombudsmen, orally or in writing, that he or she has disclosed or is considering the disclosure of information under this Act, an Ombudsman must provide information and guidance to that employee on the following matters:*

- (a) The kinds of disclosures that are protected under this Act;*
- (b) The manner in which, and the persons to whom, information may be disclosed under the Act;*
- (c) The broad role of each authority referred to in subparagraphs (i) to (x) of paragraph (a) of the definition of appropriate authority in section 3;*
- (d) The protections and remedies available under this Act and the Human Rights Act 1993 if the disclosure of information in accordance with this Act leads to victimisation of the person making the disclosure;*
- (e) How particular information disclosed to an appropriate authority may be referred to another appropriate authority under this Act."*

When an inquiry is received concerning possible disclosure, the individual concerned is normally first provided with notes on information and guidelines produced by the Office of the Ombudsmen. These notes can be made the basis of more specific guidance where that is sought.

For example, questions have arisen as to the definition of an “*employee*”, whether the matter at issue could be considered as “*serious wrongdoing*” for the purposes of the Act, and which “*appropriate authority*” might be best suited to looking at a particular problem.

Under s11(1), all public sector organisations must have appropriate internal procedures to deal with disclosures under the Act. Section 7(1) requires that a disclosure must, in the first instance, follow these procedures. This is an essential point which it has been necessary to emphasise to a number of enquirers. While there are limited exceptions, failure to observe this point can result in a loss of the protection afforded by the Act.

Although an Ombudsman may not investigate any disclosure concerning a private sector organisation, the role of providing information and guidance is not so restricted, and a number of such approaches have been made. In fact, most inquiries under the Act seem to arise from within the grey area of the public/private sector divide.

## **Protection from improper pressure**

Official information may be withheld if it is necessary to maintain the effective conduct of public affairs by protecting employees from improper pressure or harassment.

There was a request for information from AgResearch on which specific animals were being held, bred or used for research at a specific AgResearch facility.

AgResearch declined under s9(2)(g)(ii) – which protects Ministers, members of organisations, officers and employees “*from improper pressure and harassment*” - to release the information on the grounds that release would facilitate more accurate targeting of its employees and of specific animals and facilities by those opposed to animal-based research.

These concerns arose from earlier unlawful incidents including trespass (one involving use of a Molotov cocktail), damage to fences, graffiti, battery acid poured over cars, threats to kill animals, the theft and release of animals, an attack on an employee’s home, and abusive and threatening communications to employees at work and to them and their families at home.

AgResearch considered release of the information sought would facilitate more accurate targeting of staff by protesters in the future.

The Chief Ombudsman accepted that the protests, or perceived threat of them, undermined the effective conduct of public affairs and that s9(2)(g)(ii) applied to the information.

In his consideration of the countervailing interest in public disclosure, he concluded that this would be satisfied by aggregating the information sought on a company-wide basis only.

## **Confidentiality of Ethics Committees’ membership**

Where the release of information to the public may make it difficult for a statutory body to function there may be good reason to withhold the information.

The Chief Ombudsman considered a complaint that AgResearch had refused to release a list of names of all members of its animal ethics committees.

A key issue was the question of whether anyone who exercises a statutory power can ever expect their identity not to be a matter of public knowledge.

He considered that AgResearch had good reason to withhold the information relying on s6(c) of the Official Information Act – relating to maintenance of the law.

AgResearch had argued that if members of its ethics committees knew that their identities could be revealed then that could make it very difficult if not impossible to attract people to serve, or to retain them, on these committees. They would be afraid of putting themselves and their families at risk of protests (such as had already occurred).

Not only would such protests, on past experience, likely breach the law, it is also likely that these committees, without sufficient members, could not perform their statutory functions. This would also prejudice maintenance of the law.

On the evidence provided, the Chief Ombudsman agreed with AgResearch.

## **Oral requests under the OIA**

Requests under the Official Information Act (OIA) do not need to be in writing. An oral request is just as valid.

The Ombudsmen often receive complaints that oral requests have not been answered and the reason given by the holder of the information may be that the request was not in writing.

The OIA does not require that requests be in writing. But it can be useful for a request to be put in writing so that there can be no doubt as to its scope or nature. The Ombudsmen believe that a requester should not object to be asked to put the request in writing to clarify for the holder of the information exactly what is being sought.

On the other hand, complaints to an Ombudsman under the OIA may be made only in writing.

Where a complainant is unable, for whatever reason, to lodge a written complaint, the complaint will be noted down by the Office of the Ombudsmen and confirmed by a subsequent letter to the complainant

An investigation by an Ombudsman of a complaint under the OIA is a legal process, and it is necessary that both the original complaint and all subsequent steps are recorded exactly. Many of the matters with which the Ombudsmen deal are highly confidential to complainants. It is not always practicable to deal with such matters by telephone as there may be no way of guaranteeing the identity of the person speaking.

Also, there is no requirement that a requester of information cite the OIA in the request, or use the expression “*official information*” in the request, although sometimes holders of information use the excuse that this has not been done to justify not releasing it.

## **Summary, rather than details**

Where there are privacy matters that may preclude the release of all the details of what is technically official information, the public interest may be served best by releasing a summary of the salient points.

A school board of trustees had declined to release the details of a pupil's entire school record which had led to suspension from the school, to a parent, and the parent complained to the Ombudsman under the Official Information Act.

The Ombudsman upheld the board's decision, and suggested it release a summary instead, which it did.

However, in this particular case, the parent was still not satisfied. There has been a further complaint that, under the terms of the Ombudsmen Act, the pupil's suspension had not been handled properly, which is the subject of a separate investigation.

## **Prison may be liable for theft**

A prison inmate complained that another inmate had stolen goods from his cell. He maintained it was negligent of staff not to have locked his cell when he was required to leave it on a work detail, and negligent not to have checked the property being taken out of the prison by another inmate who was discharged on the same day the goods were stolen.

Prison authorities agreed that a one-off *ex gratia* sum be paid to the inmate because the staff had not adhered to prison procedures in checking the property of an inmate when released.

Although this sum was significantly less than the value of the property allegedly taken, the inmate also had possible redress through the courts as the discharged inmate was now being charged with theft.

## **Specificity of information**

Local authorities cannot decide what information to release or withhold on the basis of whether the requester can or cannot distinguish geographically the site to which the information refers.

The Chief Ombudsman received a complaint from the news media that a regional council would not release a report on the contamination of local timber treatment sites.

The council said the information would be withheld because the landowners concerned would not give their permission and could sue the council.

The Chief Ombudsman said it was difficult to see how any further prejudice could arise for the council by releasing information about contamination of a number of sites within its boundaries when all the information was already available to the public on a site-specific basis.

If the complainant had known of all the sites and asked for information then it should have been released to her, he said. The fact that the complainant did not know the location of all the individual sites had the effect of the council withholding information which would otherwise be made available to any member of the public or any organisation that was able to make site-specific requests.

Such a distinction on the availability of information was not justified in terms of the Local Government Official Information and Meetings Act, the Chief Ombudsman said, and the council agreed to release the information.

## **Necessary to maintain conventions**

Information that refers to discussions between the Department of the Prime Minister and Cabinet and the Governor-General may properly be withheld under the Official Information Act (OIA).

Section 9(2)(f)(i) of the OIA applies where it is necessary to withhold information in order to “*maintain the constitutional conventions for the time being which protect ...[t]he confidentiality of communications by the Sovereign or her representative.*”

Such protection may be necessary “*...to preserve the constitutional position of the Queen or Governor-General by limiting the visible involvement of either in matters of political controversy*” [Eagles, Taggart & Liddell, “*Freedom of Information in New Zealand*” Oxford University Press, Auckland, 1992, 364].

A requester had sought access to advice which had influenced the Governor-General to comment on her attendance at Waitangi for the 2002 Waitangi Day celebrations.

As the question of attendance at Waitangi had been particularly sensitive in recent years, it was considered necessary to withhold this information in order to “*maintain the constitutional convention*” which protects the confidentiality of communications by the Sovereign’s representative.

The Chief Ombudsman said that while the information might have been of interest to the public, there was no public interest in its release which would outweigh the constitutional convention involved.